



Environment Law Update



SUPREME COURT HOLDS GRANT OF *EX POST FACTO* ENVIRONMENTAL CLEARANCES IMPERMISSIBLE; DOCTRINE OF PROPORTIONALITY APPLIED.

*ALEMBIC PHARMACEUTICALS LIMITED & ORS. V. UNION OF INDIA & ORS.*¹ (APRIL 01, 2020)

INTRODUCTION

- This case concerns the interpretation of Environmental Impact Assessment Notification 1994 (**EIA Notification 1994**), which was promulgated by the Central Government [Ministry of Environment, Forests & Climate Change (**MOEF&CC**)] w.e.f. January 27, 1994, in exercise of powers under Section 3 of the Environment Protection Act, 1986 (**EPA 1986**), whereunder the mode and manner of assessment of the environmental impact of specified industrial activities was laid down.
- Under EIA Notification 1994, specified categories of industries were required to obtain prior Environmental Clearance (**EC**) from the Central Government as per procedure prescribed thereat, for setting up new units or undertaking expansion/modernization activities.

FACTUAL BACKGROUND

- Post promulgation of the EIA Notification 1994, certain companies set up units for manufacturing pharmaceuticals and bulk drugs in Ankleshwar, Gujarat and commenced operations without obtaining prior EC under the EIA Notification, 1994.
- MOEF&CC granted three extensions to non-conforming industrial units for obtaining EC, vide Circulars issued in 1998, 2000 and 2002. Vide Circular dt. May 14, 2002, the last and final extension for obtaining '*ex post facto* environmental clearance' was granted till March 31, 2003.
- Post 2003, *ex post facto* EC was granted to the concerned industrial units. Thus, for a period of approximately 10 years, the concerned industrial units continued operations without valid ECs.

¹ Civil Appeal No. 1526/2016 & batch

- Subsequently, the concerned industrial units also applied for, and were granted, EC for expansion/modernization, wherein *inter alia* public hearings were duly conducted as per the mandate of EIA Notification 1994.

PROCEDURAL HISTORY

- Circular dt. May 14, 2002, of the MoEF&CC was challenged before the Hon'ble Gujarat High Court under Article 226 of the Indian Constitution. In 2016, the said petition was transferred to the National Green Tribunal (NGT) for adjudication under the National Green Tribunal Act, 2010 (NGT Act).
- Vide judgment dt. January 08, 2016, NGT held that the concept of *ex post facto* EC was alien to the EIA Notification 1994 and hence grant of such *ex post facto* ECs was impermissible under law.
- By judgment dated January 08, 2016, the NGT – (i) quashed and set aside the MoEF&CC Circular dt. May 14, 2002; (ii) revoked the ECs granted to the concerned industrial units; (iii) directed closure of the concerned industrial units; and (iv) directed concerned industrial units to pay compensation to the tune of INR 10 lakhs each, to be utilized for environmental restitution in the subject area.
- MoEF&CC and concerned industrial units challenged the NGT judgment dt. January 08, 2016 before the Hon'ble Supreme Court.

ISSUES INVOLVED AND ARGUMENTS ADVANCED

- The issues which arose for adjudication before the Hon'ble Supreme Court were – (i) whether the EIA Notification 1994 made it obligatory for specified industrial units to obtain environmental clearance prior to commencement of operations; and whether provision for grant of *ex post facto* ECs could be validly made through the MOEF&CC Circular dt. May 14, 2002
- On behalf of the concerned industrial units, the following arguments were advanced:
 - NGT does not have jurisdiction to quash/set aside the Circular dt. May 14, 2002 issued by MOEF&CC
 - The issue whether *ex post facto* ECs could be granted to the concerned industrial units is academic in nature, as the said industrial units have subsequently applied for, and have duly been granted ECs for expansion/modernization as per procedure prescribed under EIA Notification 1994, including compliance with the requirement of conducting public hearings and consideration of all relevant factors
 - EIA Notification 1994 does not envisage the requirement of obtaining a 'prior EC'
 - Concerned industrial units are exempted from the requirement of obtaining prior EC, in terms of Clause 8 of EIA Notification 1994
 - In case the concerned industrial units are closed down as directed by NGT, they would suffer irreparable harm and injury, as significant investments have been made and employment has been generated for a sizeable number of people
- On behalf of the respondents, the following arguments were advanced:
 - Circular dt. May 14, 2002 is illegal, as environmental jurisprudence does not recognize the concept of *ex post facto* EC
 - Circular dt. May 14, 2002 is purely administrative in nature and cannot be said to have been issued in exercise of powers under Section 3 of EPA 1986. The said administrative Circular cannot have the effect of over-riding the mandate of EIA Notification 1994, which is statutory in nature
 - The subject area in which the concerned industries are located has reported significantly high and critical levels of pollution
 - Even if concerned units are to be permitted to continue operations, they ought to be directed to pay compensation towards environmental restitution

OBSERVATIONS AND FINDINGS

- NGT has jurisdiction to quash and set aside the impugned MoEF Circular dt. May 14, 2002. The said Circular is a purely administrative decision and cannot be said to have been issued in exercise of powers under Section 3 of EPA 1986.

- The impugned Circular has introduced the notion of an *ex post facto* EC, which is fundamentally at odds with the EIA Notification 1994 and is in derogation of fundamental principles of environmental jurisprudence, including the precautionary principle and sustainable development.
- Under EIA Notification 1994, project proponents of specified industries are obligated to obtain 'prior EC', i.e., environment clearance prior to commencement of operations. The objective behind the requirement of obtaining prior ECs is to ensure that a holistic assessment of environmental impact of specified industrial activities is carried out prior to grant of permission for undertaking such activities.
- Concerned industries set up industrial units and continued operations for nearly a decade without valid ECs.
- Additional measures adopted subsequently towards pollution control will not cure the failure to obtain ECs before the projects commenced operation and cannot cure the damage already caused to the environment as a result of manufacturing activities which were carried on without ECs.
- Concerned industries are not entitled to the benefit of the exemption contained in Clause 8 of EIA Notification 1994. Clause 8 provides that certain projects, which have already been initiated on the date when EIA Notification 1994 came into force, are exempted from obtaining prior EC, inter alia subject to the condition that all relevant clearances from the State Government have been obtained prior to January 27, 1994 (when EIA Notification 1994 came into force).
- Functioning of concerned industrial units without valid ECs (for around 10 years) would have had an adverse impact on the environment, ecology and biodiversity in the area where they are located. The area in question has recorded significantly high and critical levels of pollution as per the Comprehensive Environmental Pollution Index Reports issued by CPCB. While some of the environmental damage caused would be irreversible, some of the damage can be corrected by undertaking measures to protect and conserve the environment.
- Even though it is not possible to individually determine the exact extent of damage caused to the environment, determination of appropriate restitution measures ought to be based on the 'constitutional doctrine of proportionality'.
- In light of the aforesaid observations and findings, the Supreme Court passed the following directions:
 - Directions passed by NGT regarding revocation of ECs and closure of units were set aside
 - In exercise of powers under Article 142 of the Indian Constitution, the Hon'ble Supreme Court also directed the concerned industries to deposit compensation quantified at INR 10 Crores each with the Gujarat Pollution Control Board within 4 months of receipt of certified copy of the judgment
 - The aforesaid amount is to be utilized for restoration and remedial measures to improve the quality of the environment in the subject area where the concerned industries are located

CONCLUSION AND ANALYSIS

- The Hon'ble Supreme Court has reiterated that grant of *ex post facto* ECs is contrary to the mandate of EIA Notification 1994 as well as the fundamental principles of environmental jurisprudence, such as the precautionary principle and sustainable development. While this decision has been rendered in the context of EIA Notification 1994, the findings and observations are relevant even in respect of the subsequent EIA Notification 2006, which expressly mandates the requirement of obtaining prior ECs.
- The Hon'ble Supreme Court has adopted the 'principle of proportionality' and balanced the need to hold the industries accountable for operating without prior ECs for ten years with the interest of industry to continue operations once such EC had been obtained after following due procedure.
- The judgment is a reminder to industry that the Apex Court would not condone non-compliance of environmental laws which would be applied strictly.

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